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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1833

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS COMMONWEALTH EDISON COMPANY, *ET AL.* IN OPPOSITION

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INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES:	
Director General of Railroads v. Viscose Co., 254 U.S. 498 (1921)	9,10
Dixie Carriers, Inc. v. United States, 351 U.S. 56 (1956)	11
Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944)	11
Emporium v. New York Central R.R., 214 I.C.C. 153 (1936)	10
Interstate Commerce Commission v. J-T Transport Co., 368 U.S. 81 (1961)	11
Interstate Commerce Commission v. Mechling, 330 U.S. 567 (1947)	11
Kansas City Southern Ry. v. United States, 282 U.S. 760 (1931)	8
Lake and Rail Butter and Egg Rates, 29 I.C.C. 45 (1914)	9
Livestock, South, Southwest, Central and Western Territories, 346 I.C.C. 418 (1974)	10
Louisville & Nashville R.R. v. United States, 282 U.S. 740 (1931)	8
Railroad Co. v. Lockwood, 84 U.S. 357 (1873)	11
Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957)	11
Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)	4
STATUTES:	
42 U.S.C. §2073	4
42 U.S.C. §2201	4
49 U.S.C. §1804	4

	Page
Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337 (1978), 49 U.S.C. §10101 *et seq.*	
49 U.S.C. §10101	2,11
49 U.S.C. §10501, *formerly* 49 U.S.C. §1(1)	7,8
49 U.S.C. §10762, *formerly* 49 U.S.C. §6(1)	3,7,8
49 U.S.C. §11101, *formerly* 49 U.S.C. §1(4)	3,7
MISCELLANEOUS:	
38 Fed. Reg. 8466 (April 2, 1973)	4
H.R. Rep. No. 1395, 95th Cong., 2d Sess. (1978)	8
Sup. Ct. R. 17	6

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BRIEF OF RESPONDENTS COMMONWEALTH EDISON COMPANY, *ET AL.* IN OPPOSITION

Respondents Commonwealth Edison Company, *et al.*,[1] a group of electric utilities that operate nuclear generating plants and companies engaged in supplying goods and services for such nuclear plants, oppose the request of the principal Eastern railroads that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court below is reported at 611 F.2d 1162.

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[1] The names of Respondents are set forth in Appendix A to this Brief.

QUESTION PRESENTED

When transportation of a commodity by rail has been requested, the Interstate Commerce Commission has found that the request is reasonable, and the Eastern railroads have not challenged that finding, may they nevertheless refuse to transport that commodity on the ground that they have not "held themselves out" as common carriers of that commodity?

STATUTES INVOLVED

Involved provisions of the Interstate Commerce Act and the prior version of those provisions appear in Appendix F to the Petition. The text of 49 U.S.C. §10101, a relevant statute not referred to by Petitioners, is set forth in Appendix B to this Brief.

STATEMENT OF THE CASE

Most of the nation's railroads recognize their common carrier obligation to transport irradiated nuclear fuel (spent fuel) and radioactive waste. They transport such materials under published tariffs subject to the jurisdiction of the Interstate Commerce Commission. Only the Eastern railroads have refused to do so. This case arises out of that refusal.

The Eastern railroads contend that they have an unqualified right to refuse to handle these materials and that, if they elect to handle them as a matter of grace, they may do so at such rates and under such terms and conditions as they see fit. They do not contend that the asserted right to refuse stems from the nature of the materials. Their position is that they have an unqualified right to refuse to handle *any* commodity that they have not previously transported under a published tariff.

When items establishing ratings for spent fuel and radioactive waste were published in the Uniform Freight Classifica-

tion,[2] the Eastern Railroads "flagged out" from those items.[3] Those items thus became applicable only to movements over the Southern and Western Railroads. The Energy Research and Development Administration and these Respondents filed complaints with the Commission asserting that Petitioners' flagout violated various provisions of the Act, including §1(4), which requires common carriers to furnish transportation upon reasonable request therefor, and §6(1), which requires that all rates be included in filed tariffs.[4] The complaints requested that Petitioners be ordered to file tariffs for transportation of such commodities.

Radioactive materials include spent fuel and radioactive waste.[5] While the railroads' refusal included radioactive waste, the hearing focused on the reasonableness of their refusal to transport spent fuel. Petitioners made no effort to justify their refusal to transport radioactive waste.

Efficient and reliable transportation is essential if nuclear energy is to be feasible. The operation of a nuclear reactor is intimately tied to each stage in the nuclear fuel cycle. If the key elements of the cycle are broken, the reactor cannot function. Transportation is the link that ties the stages of the fuel cycle together. J. App. Ex. 7; J. App. Ex. 220-21.

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[2] The Uniform Freight Classification provides ratings for all articles of commerce except a very few commodities included in Rule 3, the so-called "prohibited list", which is comprised of commodities not suited for rail transportation. Radioactive materials are not on the prohibited list.

[3] The flagout is a note stating that the ratings will not apply to traffic moving to, or routed via, the lines of Petitioners.

[4] Now 49 U.S.C. §§11101 and 10762, respectively.

[5] Radioactive waste may be either high level or low level. The former consists of waste derived from spent fuel and must be handled under the same stringent conditions. The latter consists of miscellaneous items such as overalls and tools which have received some incidental contamination. They require a lesser degree of protection and can be shipped in steel drums or fiberboard boxes. Pet. App. 4d.

Spent fuel must be removed from a reactor on a regular cycle. It is stored temporarily at the reactor site but, because storage facilities at nuclear stations are limited, it must be transported from the reactor site to either storage or reprocessing facilities.

In adopting the Atomic Energy Act, Congress made a decision in favor of nuclear energy.[6] Congress recognized that transportation of radioactive materials would be essential and it vested in the Nuclear Regulatory Commission ("NRC") and the Department of Transportation ("DOT") responsibility for establishing regulations which would insure the maximum feasible degree of safety. 42 U.S.C. §§2073, 2201; 49 U.S.C. §1804. Under a Memorandum of Understanding between NRC and DOT, NRC establishes packaging standards which are then adopted by DOT, and DOT develops regulations for safe transport which are then imposed on licensees through NRC regulations. 38 Fed. Reg. 8466 (April 2, 1973).

Spent fuel can be shipped only in casks that comply with very stringent regulations. The philosophy followed by NRC in developing packaging standards was to make certain that "transportation in packages meeting these standards assure safety in transportation by all means of transport, including regular rail service." J. App. Ex. 702. In the view of the Chief of the Transportation and Products Standards Branch of NRC, the standards ensure that:

> The risk in transportation of spent fuel and radioactive waste by truck or rail, including regular train service, approach as close as reasonably possible to zero, that they reach a point where there is no economic or safety basis for further reduction.

J. App. Ex. 705.

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[6] *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557-58 (1978).

Transportation of spent fuel is in casks licensed by NRC and subject to transportation regulations prescribed by DOT. Each spent fuel cask is attached to its own railroad car. "Cask cars" consisting of the car and the attached cask are supplied by the shipper. They are designed for transportation in regular rail service and are within the size and weight limits prescribed by the railroads for general use.

There is no satisfactory alternative to rail transportation. Legal weight truck containers hold no more than 0.5 metric tons of spent fuel, whereas a rail container can hold up to 5 tons. To ship the same quantity of spent fuel requires from 7 to 10 more shipments by truck than by rail. Use of truck transportation thus multiplies the transportation risk and creates serious problems both at the reactor site and at the storage or reprocessing facility. Pet. App. 10b. 8d-9d.

The Eastern railroads have not questioned the need for rail transportation of spent fuel, but they are unwilling to assume any obligation to provide such transportation. The alternative they suggest is that the shipper attempt to enter into a separate contract for each shipment with each railroad over whose lines a shipment must move. Each individual railroad would reserve the right to refuse to enter into such a contract. Moreover, the type of contract offered in the past was cancellable at the will of the railroad and permitted the railroad to refuse to move a shipment either with or without cause even while the contract was in effect. The Commission found that the Eastern railroads' insistence on such private contracts is "tantamount to an embargo". Pet. App. 19d.

In the Initial Decision, the Administrative Law Judge held that the Eastern railroads were subject to the Act's provisions with respect to their transportation of the commodities at issue and ordered them to cancel their flagouts and publish tariffs covering the transportation of such commodities. Pet. App. 17d-18d, 21d. The rationale was that the Eastern railroads "are not free to pick and choose which commodities they will carry in common carrier service and which commodities they will

transport as private carriers", that they are obliged to furnish transportation to all shippers "upon reasonable request", and that Respondents' request for transportation was reasonable. Pet. App. 17d-19d.

On appeal, Division 2 of the Commission affirmed the Initial Decision, adopting its conclusions and findings with only minor changes. Pet. App. 3c. The entire Commission denied review of Division 2's decision on November 22, 1978.

The Court of Appeals affirmed Division 2's decision. Pet. App. B. The Court held:

> The railroads' common-carrier duties in the carriage of nuclear materials must be seen to flow from their role in effecting the National Transportation Policy. These duties are not dependent upon railroads' characterization of themselves as "private" carriers in contracts of carriage, nor upon their supposedly conscious refusal to "hold themselves out" for carriage of nuclear materials. This "holding out" may have indeed been one of the earmarks of common carriers at common law; but in the almost one hundred years since the passage of the Act there has developed a new "common" law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only "common carriage", but transportation which is subject to the Act and to the Commission's statutory powers.

Pet. App. 10b-11b.

REASONS FOR DENYING THE WRIT

Petitioners appear to contend that they are presenting the Court with "an important question of federal law which has not been, but should be, settled by this Court". Sup. Ct. R. 17. The question presented has already been decided by this Court in

cases which the Petition does not cite. In any event, the answer to the question is so clear that it cannot possibly be considered "important".

The Commission has found that Respondents' request for transportation of the involved materials is reasonable. Petitioners do not assert that that finding is not supported by substantial evidence, is arbitrary or capricious, or lacks a rational basis. They stand on the ground that they can refuse a request for transportation, which the Commission has found to be reasonable, if they have not previously "held themselves out" to transport the commodity. That contention is contrary to the plain wording of the statute, is foreclosed by decisions of this Court, and cannot be reconciled with the National Transportation Policy.

1. Whether one looks at the old sections of the Act or at the Act as codified, the statutory duty of the railroads to transport commodities upon reasonable request is so clear that the existence of such a duty cannot possibly present a question of sufficient importance to warrant the granting of a writ of certiorari.

Section 1(1) of the Interstate Commerce Act makes the provisions of that chapter applicable to "common carriers" engaged in the transportation of property by railroad in interstate commerce. Petitioners concede that they come within this definition.

Section 1(4) makes it "the duty of every commmon carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor", and §6(1) requires "every common carrier subject to the provisions of this chapter" to file "schedules showing all the rates, fares and charges for transportation . . . ."

The statute could scarcely be clearer. It requires common carrier railroads to furnish transportation under published tariffs *whenever* they are presented with a reasonable request for such transportation. The clarity of the Act is not obscured by the transparent effort in the Petition to rewrite §1(4), as applying "insofar as a railroad is acting as a common carrier"

(Pet. at 5), and to rewrite §6(1) as requiring publication of rates "for transportation undertaken by them as 'common carriers subject to the Act'." Pet. at 6.

The codification of §1(1) in 49 U.S.C. §10501 takes away even this specious argument. It omits the reference to "common carriers" and defines Commission jurisdiction as covering "transportation. . . by rail carrier". It is true, as Petitioners point out, that the codification was not intended by Congress to work substantive changes in the law. Pet. at 5 n.8. Congress did, however, intend to *clarify* the old law and it specifically clarified the jurisdictional grant of §1(1):

> The words "the Interstate Commerce Commission has jurisdiction" are substituted for "The provisions of this chapter shall apply to" in 49:1(1) and (2) to eliminate surplus language and for clarity because the intent of the words is to grant the Commission jurisdiction. The words "over transportation" are substituted for the words "to common carriers engaged in" . . . to eliminate redundancy and for consistency with the other general jurisdictional statements at the beginning of each of the subchapters of chapter 105 of the revised title, giving the Commission jurisdiction over transportation.

H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 51, *reproduced in* 1978 U.S. Code Cong. & Admin. News at 3060.

The Sixth Circuit correctly relied on that clarification in affirming the Commission's decision. Pet. App. 5b.

2. The precise question here involved was decided by this Court in *Kansas City Southern Ry. v. United States*, 282 U.S. 760 (1931). The issue there was whether railroads could carry private cars of other carriers free or at other than published rates. The railroads had always viewed the transportation of such cars as private carriage, and had never held themselves out

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[7] This is made clear in the opinion in the companion case of Louisville & Nashville R.R. v. United States, 282 U.S. 740 (1931).

to transport such cars as common carriers.[7] The railroads made the same argument that is advanced in the Petition. In rejecting that argument, this Court said:

> Upon the merits, the appellants present the argument that a railway company, in the transportation or movement of an office car of another carrier, acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in relation to such transportation. There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the act. But a common carrier dealing with transportation that is subject to the act cannot escape its statutory obligations by calling itself a private carrier as to such transportation.

282 U.S. at 764 (citations omitted).

The same view was earlier expressed by this Court in *Director General of Railroads v. Viscose Co.*, 254 U.S. 498 (1921). In holding that the Commission had primary jurisdiction to pass on the reasonableness of an attempted cancellation of the classification of artificial silk,[8] the Court relied on *Lake and Rail Butter and Egg Rates*, 29 I.C.C. 45 (1914), where the railroads, which owned the lake lines, had argued unsuccessfully that they could not be required to transport butter and eggs over rail-lake routes because they had refused to do so in the past. The Court noted:

> The contention of the carriers, faintly made, that the common law and not the Interstate Commerce Act furnished the measure of their obligation to the public was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.

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[8] The railroads sought to cancel the applicable classification item and to amend Rule 3 of the National Freight Classification by adding artificial silk to the prohibited list.

254 U.S. at 504.

This is not to suggest that a railroad must transport every commodity tendered to it for transportation without reference to whether the commodity is adapted to railroad transportation. A railroad need transport the commodity only if the request for transportation is reasonable. But, as this Court held in *Director General of Railroads*, the reasonableness of the request is a matter within the primary jurisdiction of the Commission.

In exercising its jurisdiction, the Commission has relieved the railroads of their common carrier responsibility in appropriate cases, on the ground that the request was not reasonable. Thus, in *Emporium v. New York Central R.R.*, 214 I.C.C. 153 (1936), the Commission sustained the lawfulness of a provision in Rule 3 which listed silver and gold articles as prohibited on the ground that other services, such as parcel post and express companies, are better equipped than defendants to transport such articles and that "freight service does not afford the supervision necessary to the protection of the considered commodities." 214 I.C.C. at 154. And in *Livestock, South, Southwest, Central and Western Territories*, 346 I.C.C. 418 (1974), the Commission approved the cancellation by certain carriers of rates on livestock on the ground that there was no demand for the service and the carriers did not have the facilities necessary to provide the service. In both cases, the Commission's decision was based on a finding that the request for service was not reasonable because the commodities were better suited to transportation by other modes—not, as stated in the Petition (Pet. at 5), on the ground that the railroad was not offering or engaged in the particular type of transportation as a common carrier.

In this case, the Commission considered the same issue as in *Emporium* and *Livestock*, *i.e.*, whether the request for transportation was reasonable, and found that the record established the reasonableness of the request. That finding has not been challenged.

3. As the Sixth Circuit noted, Petitioners have a "long history of the . . . carriage of nuclear materials." Pet. App. 9b. Even at common law, such carriage was common carriage, regardless of any contractual provisions to the contrary. *Railroad Co. v. Lockwood*, 84 U.S. 357, 376-77 (1873). Petitioners' reliance on this case is misplaced. The language cited at page 4 n.5 of the Petition is dictum. The holding was that the railroad had a common carrier obligation and could not limit that obligation by contract.

4. The objective of the National Transportation Policy is

> To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States . . . .

49 U.S.C. §10101(a). To that end it requires the Commission

> (1) to recognize and preserve the inherent advantage of each mode of transportation; [and]
>
> (2) to promote safe, adequate, economical, and efficient transportation . . . .

As this Court has frequently affirmed, the National Transportation Policy is "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957). *See also Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194 (1944); *Interstate Commerce Commission v. Mechling*, 330 U.S. 567 (1947); *Dixie Carriers, Inc. v. United States*, 351 U.S. 56 (1956); and *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81 (1961).

The Court of Appeals correctly found that the Commission has acted to carry out the National Transportation Policy, as 49 U.S.C. §10101(b) directs it to do. The Court of Appeals stated:

> No other mode of transportation is more suited to the economical carriage of these materials [spent fuel and radioactive wastes] than train carriage, according to the findings of the Commission. . . .

> The Commission has found that truck shipment of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials, and, even if no mishap occurs, result in greater exposure to radiation of transportation workers and the general populace. If the Congressional delegation to the Commission of power to implement the National Transportation Policy is to be effective, the Commission must have the statutory authority exercised by its order. . . .

Pet. App. 10b.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix A

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Rochester Gas and Electric Corporation

Southern California Edison Company

Union Electric Company

Vermont Yankee Nuclear Power Corporation

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Pennsylvania Power & Light Company

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Appendix B

49 U.S.C. §10101. *Transportation Policy.*

(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.